

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT  
N.D. OF N.Y.  
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UNITED STATES OF AMERICA,

Plaintiff,

v.

PONDEROSA FIBRES OF AMERICA, INC.;  
MARTIN B. BERNSTEIN; NATHAN  
BERNSTEIN; JEFFREY FEIL; ESTATE  
OF LOUIS FEIL; ROLAND O.A.  
FJALLSTROM; JEROME GOODMAN;  
and ROBERT L. PITMAN,

Defendants.

Civil Action No. 99-CV-1305 (FJS/RWS)

CONSENT DECREE BETWEEN THE  
UNITED STATES AND DEFENDANT  
PONDEROSA FIBRES OF AMERICA,  
INC.

PONDEROSA FIBRES OF AMERICA, INC.,

Defendant and Third-Party Plaintiff,

v.

THE BANK OF NEW YORK; SONOCO  
PRODUCTS CORP.; LITTLE RAPIDS CORP.;  
DIAMOND INTERNATIONAL CORP.;  
JEFFERSON SMURFIT CORP. (U.S.);  
SMURFIT PACKAGING CORP.; and  
"XYZ CORP.," whose true name is unknown  
at this time,

Third-Party Defendants.

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## **I. BACKGROUND**

A. On August 18, 1999, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter ("Complaint") against Ponderosa Fibres of America, Inc. ("PFA"), pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred at or in connection with the release or threatened release of hazardous substances at the St. Lawrence Pulp and Paper Superfund Site, in the City of Ogdensburg, St. Lawrence County, New York ("Site").

B. On October 13, 2000, Magistrate Judge Ralph W. Smith, Jr. granted the United States' Motion to Amend its Complaint to add Section 107 claims, 42 U.S.C. § 9607, against PFA President Martin Bernstein and Vice President Jerome Goodman. The United States' Amended Complaint also added claims for fraudulent conveyance, under Sections 3304 and 3306 of the Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. §§ 3304, 3306, and under the Federal Priority Statute, 31 U.S.C. §§ 3701, *et seq.*, against Martin Bernstein, Nathan Bernstein, Jeffrey Feil, the Estate of Louis Feil, Roland O.A. Fjallstrom and Robert L. Pitman. PFA appealed the Magistrate Judge's Order. On May 21, 2001, this Court issued an order denying PFA's appeal and permitting the United States to join parties and amend its Complaint.

C. On April 30, 2001, PFA filed a petition for protection from its creditors under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330. *In re: Ponderosa Fibres of America, Inc.*, Case No. 01-1578 (SLR) (Bankr. D. Del.) ("Bankruptcy Action"). To become effective, this Consent Decree must be approved by the court in the Bankruptcy Action and entered by this Court.

D. The Defendant that has entered into this Consent Decree ("Settling Defendant") does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the Amended Complaint.

E. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, that this Consent Decree is fair, reasonable and in the public interest, and that there is no just reason for delaying entry.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331, 1345, 2201 and 3001 *et seq.*, and 42 U.S.C. §§ 9607 and 9613(b). Settling Defendant consents to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in legal status, including but not limited to, any transfer of assets or real or real property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

## **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to

them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

- a. "Bankruptcy Action" means *In re: Ponderosa Fibres of America, Inc.*, Case No. 01-1578 (SLR) (Bankr. D. Del.).
- b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- c. "Consent Decree" shall mean this Consent Decree.
- d. "Cost Recovery Action" means *United States v. Ponderosa Fibres of America, Inc. et al.*, Civil Action No. 99-CV-1305 (FJS/GLS) (N.D.N.Y.).
- e. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the next working day.
- f. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- g. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- h. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- i. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).
- j. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

k. "Parties" shall mean the United States and Settling Defendant.

l. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has incurred at or in connection with the Site through the date of lodging of this Consent Decree, pursuant to Paragraph 23, plus accrued interest on all such costs through such date.

m. "PFA" means Ponderosa Fibres of America, Inc. and its successors and assigns.

n. "Plaintiff" shall mean the United States.

o. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

p. "Settling Defendant" shall mean PFA.

q. "Site" shall mean the St. Lawrence Pulp and Paper Superfund Site, encompassing approximately 17 acres, located at 2 Madison Street in the City of Ogdensburg, St. Lawrence County, New York.

r. "United States" shall mean the United States of America.

#### **V. REIMBURSEMENT OF RESPONSE COSTS**

4. Payment of Past Response Costs to the EPA Hazardous Substance Superfund. In reimbursement of Past Response Costs, Settling Defendant consents to entry of a judgment against PFA in the amount of \$775,000 in settlement of the United States' claim against PFA in this action pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), which amount, upon the effective date of this Consent Decree, shall be treated as an allowed general unsecured claim by the United States in the PFA Bankruptcy Action. The United States will seek payment in satisfaction of such claim in the Bankruptcy Action, with payment to be made in the same time and manner as holders of other allowed unsecured claims without being subordinated to such other allowed unsecured claims. Payment on the

allowed claim shall be made by Electronic Funds Transfer ("EFT") to the DOJ account in accordance with current EFT procedures, referencing USA File Number 1999v00729, EPA Region II and Site Spill ID Number 02-GO, and DOJ Case Number 90-11-2-1223/1. Payments shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the Northern District of New York following lodging of the Consent Decree. Any payments received by the DOJ after 4:00 p.m. Eastern Time shall be credited on the next business day. Settling Defendant shall send notice to EPA and DOJ that each payment has been made, in accordance with Section XII (Notices and Submissions).

#### **VI. BANKRUPTCY COURT AND DISTRICT COURT APPROVAL**

5. Settling Defendant shall use best efforts to obtain approval of the court in the Bankruptcy Action ("Bankruptcy Court"), pursuant to Bankruptcy Rule 9019, to enter into the settlement reflected in this Consent Decree. If for any reason the Bankruptcy Court declines to allow Settling Defendant to enter into this Consent Decree or this Court declines to approve this Consent Decree in the form presented this Consent Decree shall be null and void, without prejudice to its being submitted in revised form for approval by the Court.

#### **VII. COVENANT NOT TO SUE BY PLAINTIFF**

6. Covenant Not to Sue by Plaintiff. Except as specifically provided in Paragraph 7 (Reservation of Rights by United States), the United States covenants not to sue Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Past Response Costs to the EPA Hazardous Substance Superfund), as approved by the Bankruptcy Court. This covenant not to sue is conditioned upon the satisfactory

performance by Settling Defendant of its obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

7. Reservation of Rights by United States. The covenant not to sue set forth in Paragraph 6 does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to:

- a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;
- b. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- c. criminal liability;
- d. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606; and
- e. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs.

#### **VIII. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

8. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Consent Decree, including but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;



b. any claim arising out of response actions at the Site for which Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

9. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

#### **IX. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

10. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

11. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs.

12. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of such claim or of the complaint in such suit. In addition,

Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any motion for summary judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

13. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VII.

#### **X. ACCESS TO INFORMATION**

14. Settling Defendant shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site, except that Settling Defendant need not provide duplicate copies of documents and information that it or its counsel have already provided to EPA and that remain in EPA's possession.

15. Confidential Business Information and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R.

2.203(b). Documents or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendant.

b. Settling Defendant may assert that certain documents, records or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing documents, they shall provide Plaintiff with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports or other information created or generated pursuant to the requirements of this or any other consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records and documents that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Defendant's favor.

16. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

#### **XI. RETENTION OF RECORDS**

17. Until 10 years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control that relate in any manner to response actions taken at the Site or the liability of any person for response actions conducted and to be conducted at the Site, regardless of any retention policy to the contrary, except records and documents that Settling Defendant or its counsel already provided to EPA.

18. After the conclusion of the document retention period in the preceding paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such records or documents to EPA or DOJ, except those that Settling Defendant or its counsel already provided to EPA or DOJ which remain in EPA's or DOJ's possession. Settling Defendant may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the request with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the

document shall be provided to Plaintiff in redacted form to mask the privileged information only.

Settling Defendant shall retain all records and documents that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Defendant's favor.

19. By signing this Consent Decree, Settling Defendant certifies that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against Settling Defendant regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to document production requests and pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

## **XII. NOTICES AND SUBMISSIONS**

20. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any

written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Settling Defendant, respectively.

As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ # 90-11-1223/1)  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Attention: David L. Weigert, Esq.

As to EPA:

Brian E. Carr, Esq.  
Office of Regional Counsel  
New York/Caribbean Superfund Branch  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway, 17th Floor  
New York, NY 10007-1866

As to Settling Defendant:

David S. Howe, Esq.  
Hancock & Estabrook, LLP  
1500 Mony Tower 1  
P.O. Box 4976  
Syracuse, NY 13221-4976  
Phone: (315) 471-3151  
Facsimile: (315) 471-3167

**XIII. RETENTION OF JURISDICTION**

21. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

**XIV. INTEGRATION**

22. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The

Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

**XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

23. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

24. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**XVI. EFFECTIVE DATE**

25. The effective date of this Consent Decree shall be the latter of (1) the date upon which the Bankruptcy Court approves Defendant's entry into this settlement and (2) the date upon which this Consent Decree is entered by this Court.

**XVII. SIGNATORIES/SERVICE**

26. The undersigned representative of Settling Defendant and the Deputy Section Chief of the Environmental Enforcement Section of DOJ certify that they are authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

27. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

28. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

#### **XVIII. FINAL JUDGMENT**

29. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

**SO ORDERED:**

Date: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE



THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Ponderosa Fibres of America, Inc., Civil Action No. 99-CV-1305, relating to the St. Lawrence Pulp and Paper Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: 12/11/03

\_\_\_\_\_  
CATHERINE R. MCCABE  
Deputy Section Chief  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice

Date: 12/1/03

<  
\_\_\_\_\_  
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445 Broadway, Room 231  
Albany, New York 12207

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Ponderosa Fibres of America, Inc., Civil Action No. 99-CV-1305, relating to the St. Lawrence Pulp and Paper Superfund Site.

FOR THE U.S. ENVIRONMENTAL  
PROTECTION AGENCY

Date: 10/21/03

JANE M. KENNY  
Regional Administrator, Region 2  
U.S. Environmental Protection Agency

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Ponderosa Fibres of America, Inc., Civil Action No. 99-CV-1305, relating to the St. Lawrence Pulp and Paper Superfund Site.

FOR SETTLING DEFENDANT  
~~PONDEROSA~~ FIBRES OF AMERICA, INC.

Date: 8/22/03

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_